IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 881

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner, and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Charterer of the steamship "VENICE MARU", for Exoneration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., *et al.*,
Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI KISEN KABUSHIKI KAISHA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

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Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Consumers Import Co., Inc., and other cargo claimants similarly situated, petitioning this Court for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit against respondents Kabushiki Kaisha Kawasaki Zosenjo and Kawasaki Kisen Kabushiki Kaisha, respectfully show:

Statement of the Matter Involved.

Petitioners are owners of cargo which was destroyed or seriously damaged in August, 1934, on board the Japanese steamship "Venice Maru," a general ship and common carrier, by reason of a fire on that vessel, while she was on a voyage from Japanese ports to U. S. Atlantic ports via the Panama Canal. Respondent Kabushiki Kisen Kawasaki Zosenjo, (hereinafter called Kawasaki Zosenjo), is the drydock company which built the "Venice Maru" and thereafter let her under a bareboat form of charter to the other respondent, Kawasaki Kisen Kabushiki Kaisha, (hereinafter called the "K" Line or the Carrier). The "K" Line was in possession of the "Venice Maru," appointed and paid her master and crew, operated her as a common carrier, and made all contracts of affreightment, including the bills of lading for the cargo in suit.

The respondents on November 16, 1934, instituted a proceeding in Admiralty in the United States District Court for the Southern District of New York, praying for exemption from or the limitation of liability in respect of claims for such loss and damage of cargo. Kawasaki Zosenjo was not a party to any of the contracts of carriage; its sole connection with the case is that petitioners, because of such loss and damage, asserted claims *in rem* against the "Venice Maru." Both respondents (referred to as petitioners in the District Court) filed a joint stipulation whereby their stipulator undertook that it would file at a later stage in the proceedings a stipulation for value in the usual form, covering the shipowner's interest in the vessel (R. 24). Thus the liability which Kawasaki Zosenjo, as shipowner, sought to defend by the petition was *in rem* against the ship, and that which the "K" Line, as charterer, sought to defend was *in personam* against it as carrier.

Both respondents claimed the benefit of the so-called Fire Statute and prayed for exoneration from liability

because the loss was caused by fire. The text of the Fire Statute is printed in the appendix. It is Sec. 182, U. S. Code, Title 46, (formerly R. S. 4282) and is derived from the Act of Congress of March 3, 1851, c. 43, 1, 9 Stat. 635. They also sought limitation of liability under Sec. 183, U. S. Code, Title 46, which section was also derived from the Act of March 3, 1851, c. 43, 3, 9 Stat. 635, as amended. The text of this section, as it then read, is also printed in the appendix.

Both Courts below sustained the contention of the respondents and granted them the relief prayed for under the Fire Statute.

Jurisdiction.

The jurisdiction of this Court over this case is based on Section 240 of the Judicial Code (28 U. S. Code, Sec. 347) and Article III, Section 2, of the Constitution.

The Facts.

The District Court made elaborate findings of fact (R. 1979-91), which were adopted by the Circuit Court of Appeals (R. 2049), and which contain all of the facts material to this application. The findings which need to be considered on this application may be summarized as follows:

On August 6, 1934, shortly before the S. S. "Venice Maru" reached Balboa, at the Pacific end of the Panama Canal, on her way from her loading ports in the Orient to U. S. Atlantic ports, fire broke out in her No. 1 lower hold, which hold was entirely filled with bags of sardine meal, a known hazardous cargo likely to catch fire from spontaneous combustion if not adequately ventilated (R. 1983-4; 2042). In consequence of this fire, the sardine meal and also the general cargo stowed in the upper and lower 'tween decks, which are immediately above lower hold

No. 1 where the sardine meal was stowed, were seriously damaged by fire or by water used to extinguish the fire.

The stowage of the sardine meal was improper (R. 1985; 1988; 1989; 2048-9). Because of such stowage and the danger of fire from the sardine meal, the "Venice Maru" was unseaworthy (R. 1988); and such improper stowage was the proximate cause of the fire (R. 1989; 2048-9). All the cargo, including the sardine meal, was in good condition when loaded and the meal was fit for carriage "from Kobe to New York if properly stowed and ventilated" (R. 1982; 1984; 2041).

Mr. Okubo, Acting President and General Manager of the Carrier and its active head (R. 1986), knew that sardine meal was hazardous, likely to heat and to take fire by spontaneous combustion, and that a considerable part of the sardine meal would be stowed in the lower holds of the "Venice Maru" (R. 1986; 2045). Although there had been numerous shipments of sardine meal from Japan to the Pacific Coast of the United States, there had been no shipment of this commodity to Atlantic Coast ports by the Carrier before February 3, 1933, a little more than one year before the shipment on the "Venice Maru" (R. 2042). Before the shipment on the "Venice Maru", the "K" Line had had experience with overheating of fish meal cargoes on a number of its vessels which had carried the commodity on the long voyage from the Orient to U. S. Atlantic ports (R. 1984; 1986; 2042). In each of these cases the overheating had occurred after the vessels had left Los Angeles and while they were on their way via the Panama Canal from U. S. Pacific Coast ports to the U. S. Atlantic Coast ports (R. 1984). In two of these instances the "K" Line had used rice ventilators in an unsuccessful attempt to provide the requisite ventilation (R. 1984; 1986; 2042). Abundant circulation of air is necessary in stowage of sardine meal to prevent heating (R. 1985).

After its unfortunate experiences from overheating of sardine meal aboard its vessel used on the Japan-United

States Atlantic ports service, the "K" Line employed a Captain Fegen to supervise the stowage of sardine meal at Kobe (R. 2043). He, however, was not given authority to accept or reject sardine meal as cargo, or to decide what quantity could be carried safely, nor was he authorized to have anything whatever to do with any of the cargo other than the sardine meal (R. 1985-6; 2044). Fegen, who had had no actual experience in carrying sardine meal (R. 2043; 2045), had not been informed by the "K" Line of its own previous unsatisfactory experiences in carrying sardine meal (R. 2043); and he used rice ventilators to provide circulation of air for the exceptionally large quantity of sardine meal loaded on the "Venice Maru". In so doing, he merely followed the method which the "K" Line itself had used (R. 1983-4; 2045).

In 1935, after the fire on the "Venice Maru", "when it was realized that the experiments with rice ventilators proved unsatisfactory" (R. 1984), a method of stowage, known as "the block and channel method", came into general use as the proper means of providing sufficient ventilation for sardine meal (R. 1984). In 1934, as put by the Circuit Court of Appeals, "the stowage of such meal was still in flux; it was not till the next year that 'block and channel' stowage became the standard" (R. 2045; see also R. 2049). In short, before 1935, and at the time the sardine meal in suit was shipped, the proper method of stowing such a large quantity of sardine meal as that accepted by the "K" Line for carriage on the "Venice Maru", was still a matter of experimentation (R. 1984; see also R. 2045, 2049).

"The evidence does not establish any custom or usage in the carriage of fish meal from Japan to Atlantic Coast ports which justified the stowing of 665.5 tons of fish meal"—(the quantity of sardine meal in No. 1 hold of the "Venice Maru")—"with or without rice ventilators, in a substantially solid mass so as to almost fill a lower hold" (Finding 25, R. 1984-5). Such stowage of the sardine meal constituted a proximate cause of the fire (R. 1985;

1989). Even assuming that rice ventilators had been used in the manner claimed by the respondent carrier, the amount of ventilation provided for the meal was insufficient (R. 1985).

Both Courts exonerated the "K" Line and the ship because the carrier had employed Fegen to oversee the stowage of the sardine meal. They both held that Captain Fegen was not the Marine Superintendent, General Agent or Managing Officer of the "K" Line and that he was without power to control the movement of the ship or her crew, or to bind the "K" Line by contract (R. 1986-7, and 2044).

The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals expressly found that "although Okubo was not personally acquainted with what was necessary to protect the meal on such a long voyage, he had had ample notice that it was subject to heating" (R. 2045). It found further, that as heating can lead to fire, failure to prevent heating would be a cause of any resulting fire (R. 2045). It then said: "If therefore, in July, 1934, Okubo had taken no action the charterer might well have been liable" (R. 2045). Citing *Hines* v. *Butler*, 278 Fed. 877, 880 (C. C. A. 4); *Williams S. S. Co.* v. *Wilbur*, 9 Fed. (2d) 622 (C. C. A. 9); *Bank Line* v. *Porter*, 25 F. (2d) 843 (C. C. A. 4); *The Elizabeth Dantzler*, 263 Fed. 596. The Circuit Court of Appeals then held that the "K" Line had taken sufficient action by hiring Fegen to devise a proper method of stowage, and that, as the method of stowage adopted by Fegen was the cause of the fire, the carrier was protected by the Fire Statute (R. 2045), particularly since it found that "in July, 1934, it had not yet certainly appeared that, given properly made meal, such ventilators were not adequate to protect even such a large single block as half of" the quantity stowed in the No. 1 lower hold of the "Venice Maru".

In referring to the admitted failure of Okubo to tell Fegen of the earlier cargoes that heated, the Court held that this was not negligent, because it felt that Okubo was justified in assuming that Fegen would familiarize himself with the "K" Line's past experience, by inquiring of the "K" Line's masters (R. 2046). It then held further:

> "Besides, even if it was negligent not to inform him, it does not appear that Fegen did not inform himself; or that, if he did not, his ignorance made any difference: *i. e.*, that his knowledge of the charterer's past experience would have led him to discard 'ice ventilators'. Since the claimants have the burden of proving 'neglect' under this statute—unlike the Limited Liability Statute—they must in any event fail upon this issue, for by no stretch can it be said that they proved that the fire was 'caused' by Fegen's ignorance of the charter's past experience" (R. 2046).

As to the interest which Kawasaki Zosenjo sought to defend, the Circuit Court held that even though such liability was *in rem*, the Fire Statute was applicable to that liability (R. 2043).

Questions Involved and Reasons for Granting the Writ.

I. *Does the Fire Statute relieve the carrier from liability for damage by fire caused by stowage of a hazardous cargo on a general ship when there is no established, uniform or definite custom warranting the stowage of such cargo in the manner followed by the carrier and when, in fact, the method of stowage adopted was no more than an experiment?*

The Circuit Court of Appeals for the Ninth Circuit in the case of *Williams S. S. Co.* v. *Wilbur*, 9 F. (2d) 622, affirming 9 F. (2d) 940 (N. D. Cal.), cert. denied 271 U. S. 666, decided this question in the negative. So also did the Circuit Court of Appeals for the Fourth Circuit in

the case of *Bank Line* v. *Porter*, 25 F. (2d) 843. The Courts below, however, decided the question in the affirmative.

In the *Williams S. S. Co.* and the *Bank Line* cases, the carrier's duty on accepting goods for carriage and in handling them after they had been accepted is thus expressed:

> "The law imposes upon owners of ships the duty of using due care to ascertain and consider the nature and characteristics of goods offered for shipment, and to exercise due care in their handling, including * * * such methods as their nature requires." [9 F. (2d) at 942; 25 F. (2d) at p. 845]

See also *The Nichiyo Maru*, 89 F. (2d) 539 (C. C. A. 4).

In the present case the "K" Line knew that sardine meal was a hazardous cargo, known to be likely to fire from spontaneous combustion (R. 2045) and known to require by its nature ample ventilation (Finding 26, R. 1985). Therefore, it was charged with the duty of exercising due care in handling the sardine meal and in adopting such methods as its nature required to prevent it from taking fire from spontaneous combustion, *i. e.*, by giving it proper stowage and adequate ventilation.

As was naturally to be expected from the fact that Fegen had not been told of the trouble which the "K" Line had experienced, he adopted a method of ventilation for the "Venice Maru" cargo which was very similar to that which the "K" Line itself had used before it employed him (see p. 4, *supra*). The Circuit Court of Appeals for the Second Circuit held that in spite of these circumstances, the Fire Statute protected the "K" Line since "in July, 1934 it had not yet certainly appeared that, given properly made meal," the method followed by Fegen was not adequate (R. 2045). Both Courts below had found that the sardine meal loaded on the "Venice Maru" was fit for transportation if properly stowed and ventilated

(R. 1982; 2041), which involved not stowing too great a quantity in lower holds; and that the proximate cause of the fire was the improper method of stowage adopted by Fegen in placing "665.6 tons of sardine meal in a substantially solid mass in No. 1 lower hold" (Conclusion 1, R. 1989; Findings 27 and 28, R. 1985) and in relying on rice ventilators for circulation of air (R. 1985).

This holding is in square conflict with that of the Circuit Court of Appeals for the Ninth Circuit in *Williams S. S. Co.* v. *Wilbur*, 9 F. (2d) 622, where that Court, in denying the carrier the benefit of the Fire Statute, held:

> "One of the witnesses testified that fish meal had been stowed on other vessels operated by the appellant in a very similar manner on several occasions, that it was the practice of the appellant to stow fish meal in that way, that he had seen the general agent at Baltimore on board while the stowage of fish meal was in progress, and that the agent saw and knew the manner in which such cargo was stowed. In addition to this, the appellant contends that the cargo now in question was stowed in the usual and customary manner. In the face of this testimony and this contention, it cannot be said that the owner was not responsible for the method of stowage adopted and followed, even though there is an absence of testimony tending to show that its managing officers or agents superintended the stowage of this particular cargo." (9 F. (2d) at p. 623.)

In short, the Ninth Circuit holds that when a subordinate follows an improper method of stowage previously adopted by a shipowner, such improper stowage is chargeable to the neglect of the shipowner personally, whereas the Second Circuit holds, under almost identical circumstances, that the shipowner is in no way chargeable with the results of such improper stowage.

We submit that on the findings in the present case the "K" Line was responsible although Okubo did delegate supervision of the stowage of the sardine meal

to Fegen and although there is an absence of testimony that Okubo superintended the stowage of the "Venice Maru". "Mr. Okubo was the Acting President and General Manager of the 'K' Line and its only officer actively participating in its business affairs and the operations of its vessels" (Finding 35, R. 1986). The meal was stowed at Kobe (Finding 5, R. 1981), where the main office of the "K" Line was located (Finding 2, R. 1979-80). In these circumstances, there was a "duty to act" (*Earle & Stoddart v. Wilson Line*, 287 U. S. 420, footnote, p. 427), and as the contract of carriage was made at Kobe with the knowledge of Okubo (R. 1986), that duty was upon Okubo. The Court below holds that this duty was performed merely by employing Fegen, whereas in the *Williams S. S. Co.* case the Circuit Court of Appeals for the Ninth Circuit holds that where the stowage was in the usual manner (or as the Circuit Court of Appeals for the Second Circuit put it in this case, the accepted way of protecting heating cargoes), then the negligence is that of the carrier personally and the absence of evidence as to actual knowledge of the stowage of a particular shipment is immaterial. This is especially so when this is all done at the vessel's home port with the approval of the managing officer of the carrier which is the situation here. In other words, the acceptance of a hazardous cargo for carriage, when there is no certain way of carrying it safely in large quantities, is the personal neglect of the carrier. This conflict between these cases, unless resolved by a decision of this Court, will leave our maritime law on this important question in a state of uncertainty and confusion.

The conflict of the decision below with *Bank Line v. Porter*, 25 F. (2d) 843 (C. C. A. 4), cert. denied 278 U. S. 623, where the Circuit Court of Appeals for the Fourth Circuit denied the benefit of the Fire Statute to a carrier who had knowledge of "a condition involving danger of fire" (25 F. (2d) at p. 845), also confuses the

law on this important question. In that case the Court said:

> "In this case, as in the case of *The Elizabeth Dantzler*, 263 F. 596, we are of the opinion that, taking into consideration the nature of the cargo and climatic conditions at Ponta Delgada, the fire was reasonably to be feared and provided against, if not to be expected. All these facts were in possession of the owners of the 'Poleric'; their agents were on the ground, and no steps taken to prevent the fire. Knowledge of facts that may be reasonably expected to lead to certain results imposes a direct liability for those results. *The Eastern Glade* (C. C. A.), 13 F. (2d) 555; *Willfaro-Willsolo* (D. C.), 9 F. (2d) 940." (25 F. (2d) 845).

To the same effect is *Hines* v. *Butler*, 278 Fed. 877 (C. C. A. 4), cert. denied 257 U. S. 659, which is also in conflict with the decision below.

On this question the decision below is also in conflict with the English law. In *Leonard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.*, (1915) A. C. 705, affirming (1914) 1 K. B. 419 (C. A.), the House of Lords held that where a managing director of a company knew, or had means of knowing, a condition of a vessel which rendered her unseaworthy and gave no instructions as to such condition, the neglect was the personal neglect of the shipowner and deprived it of the benefits of the Fire Statute. In the Court of Appeals in that case, Hamilton, *L. J.* (afterwards Lord Summer), whose judgment was mentioned with approval in the House of Lords, said:

> "I recall that with proper diligence the owners might have prevented all this and must have known the special perils attending the transport of benzine in bulk, for it was their trade. When these owners asked this Court to find that the fire, which naturally ensued in the circumstances, 'happened without their actual fault or privity', I refuse." [(1914) 1 K. B. at p. 441]

It is desirable that the law of England and the law of the United States be in harmony on this important question of the maritime law. *Queen Insurance Co.* v. *Globe & Rutger's Fire Ins. Co.*, 263 U. S. 487, 493; *Aetna Ins. Co.* v. *United Fruit Co.*, 304 U. S. 430, 434.

II. *Does the Fire Statute exonerate a carrier from liability for loss or damage to goods carried by it when the carrier delegates its obligation as to the stowage of a commodity, which it knows to be hazardous and likely to catch fire from spontaneous combustion and which forms a large part of the ship's cargo, to a surveyor, without informing the surveyor of its unsatisfactory experience in stowing and carrying such hazardous commodity in a new trade?*

The Court below answered that question in the affirmative. The Circuit Court of Appeals for the Fourth Circuit in *Bank Line* v. *Porter*, 25 F. (2d) 843, cert. denied 278 U. S. 623, answered it in the negative.

The Courts below found that Mr. Okubo did not inform Captain Fegen, nor instruct any one else to inform him, of the experience with overheating which the "K" Line had had in the carriage of sardine meal and of the failure of the "K" Line's prior methods of stowage, including the use of rice ventilators, to prevent heating (R. 1987; 2043). Nevertheless, they held that such failure was immaterial because they assumed, without any evidence on the point, that Fegen could have ascertained that experience by inquiry of other masters of the "K" Line (R. 1987; 2046).

In *Bank Line* v. *Porter*, 25 F. (2d) 843, a fire occurred in a cargo of jute on board the S. S. "Polerie" from spontaneous combustion, due to the delay of the vessel at Ponta Delgada awaiting repairs following her breakdown on her voyage from Calcutta to New York. The breakdown and delay were caused by the vessel's unseaworthy

condition at Calcutta at the inception of the voyage. The shipowner contended that the unseaworthiness was not due to its neglect, but to the neglect of a Lloyd's surveyor whom it had employed at Calcutta to make the vessel seaworthy. Upon it appearing that the shipowner had failed to inform the surveyor of previous difficulties with the vessel, the Circuit Court of Appeals for the Fourth Circuit indulged in no assumptions as to whether the surveyor could have secured from other sources, such as the vessel's officers and log books, information respecting the vessel's prior difficulties, but held that the owner's failure to furnish such information constituted neglect on its part which barred the owner from the benefits of the Fire Statute (25 F. (2d) at p. 845).

The House of Lords has also held that a shipowner's failure to furnish to a party to whom he has delegated the responsibility of maintaining his vessel in a safe and seaworthy condition facts within his knowledge affecting her safety constitutes his personal neglect. *The Schwan*, (1909) A. C. 450; *Leonard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.*, (1915) A. C. 705. It is no excuse that the employee might be able to ascertain such facts from other sources. *Standard Oil Co.* v. *Clan Line Steamers*, (1924) A. C. 100, where Lord Parmoor said at pp. 130-131:

> "The fact that the captain of a vessel may find out for himself, after a certain period of time, a source of unusual danger, which was within the knowledge of the shipowners, and might have been communicated directly to him in the first instance, is not sufficient to justify the shipowners in subjecting a cargo to the risk of loss, or to exempt them from liability for not exercising due diligence if such a loss has been incurred."

The contrary ruling of the Second Circuit in the case at bar should be reviewed to the end that harmony be restored, not only between the different Circuits in this

country, but also with the House of Lords on this important point. The Hague Rules, which are incorporated into both the American and British Carriage of Goods by Sea Acts,* contain in subdivision 2 (b) of Article 4 an exemption against liability for loss from "fire unless caused by the actual fault or privity of the carrier" (46 U. S. Code, Section 1304). The language of these Rules is identical in England and the United States and if they are to receive a different interpretation in the two countries, many years of painstaking work by commercial men to arrive at uniformity in the law of carriers will have gone for naught.

It thus appears that there is a clear cut conflict between the Second Circuit on the one hand and the Fourth Circuit and the House of Lords on the other hand as to what constitutes "neglect" within the meaning of the Fire Statute.

III. *Is it sufficient for a carrier, in order to obtain the benefit of the Fire Statute, to show merely that there was a fire and no more? Or must the carrier bring itself within the full terms of the Statute in order to obtain its benefits, i. e., show that the fire occurred without its neglect?*

The Circuit Court of Appeals for the Second Circuit holds that cargo owners "have the burden of proving 'neglect' under this statute, unlike the Limited Liability Statute * * *" (R. 2046). It does not state why it is sufficient for a shipowner seeking the protection of Section 1 of the Act of March 3, 1851, to bring itself partially within the terms of that Section, although, to obtain the protection of Section 3 of the same Act, it must bring itself wholly within the terms of the latter Section [see *The Silver Palm*, 94 F. (2d) 776, 777 (C. C. A. 9), where the authorities on the burden of proof under Section 3 are collected]. The Court below merely cited in support of this dis-

* The American Act (46 U. S. Code, Sec. 1300 *et seq.*) was not passed until April 17, 1936, or nearly two years after the voyage in question. The British Act (14 and 15 Geo. V, C. 22) was adopted in 1924 and is in all material respects identical with the American Act.

crimination the District Court's ruling in *The Strathdon*, 89 F. 374, 378 (E. D. N. Y.) and its own rulings in *The Salvore*, 60 F. (2d) 683, and *The Older*, 65 F. (2d) 359. In the last of these cases it gave the following reason to support the holding:

> "The situation is like any other where the claimant brings himself within an exemption, in which event the libelant must prove that he has been negligent." (65 F. (2d) at p. 360).

The fallacy in this reasoning is that the carrier does not bring itself within the exemption specified in the Fire Statute by the mere showing of fire. The holding below ignores the fact that the release from liability by its terms is subject to a qualifying clause. This was pointed out by this Court in *Walker v. Transportation Co.*, 3 Wall. 150, 153, where this Court said:

> "By the language of the first section the owners are released from liability for loss by fire in all cases not coming within the exception there made." (3 Wall. at p. 153).

This Court in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, made a similar observation. There it said:

> "The fire statute, in terms, relieves the owners from liability 'unless such fire is caused by the design or neglect of such owner'." (287 U. S. at p. 425.)

Thus proof of a loss caused by a fire which may or may not have been caused by shipowner's design or neglect, does not establish a shipowner's right to the exemption. To obtain the benefit of the exemption, the shipowner must show that the fire happened without any neglect on its part. This Court so said in *Providence, &c. Co. v. Hill Manufacturing Co.*, 109 U. S. 578:

> "They [the shipowners] may not be able, under the first section [the fire provision is Sec. 1 of the Act of March 3, 1851, now 46 U. S. C. § 182] to show that it happened without any neglect on their part, or

what a jury may hold to be neglect; whilst they may be very confident of showing, under the third section [the limitation of liability provision is Sec. 3 of the Act of March 3, 1851, now 46 U. S. C. § 183], that it happened without their privity or knowledge." (109 U. S. at p. 602.)

The English Courts have taken the same view. In *Leonard's Carrying Co., Ltd.*, v. *Asiatic Petroleum Co., Ltd.*, (1915) A. C. 705, Lord Dunedin in the House of Lords said at pp. 715-716:

> "But, my Lords, I think the true criterion of the case is that which was found and applied by Hamilton, L. J., that the parties who plead this 502nd section* must bring themselves within its terms; and therefore the question is, have the company freed themselves by showing that this arose without their actual fault or privity? I think they have not."

See also particularly *Ingram & Royle, Ltd.*, v. *Services Maritimes du Treport*, (1913) 1 K. B. 541, 559 (C. A.).

The present decision is in conflict with *Bank Line* v. *Porter*, 25 F. (2d) 843, cert. denied 278 U. S. 623, on this question also. After referring to Mr. Okubo's admitted failure to inform Captain Fegen of the "K" Line's bad experience in the carriage of sardine meal, the Circuit Court of Appeals here said:

> "Besides, *even if it was negligent not to inform him, it does not appear that Fegen did not inform himself; or that, if he did not, his ignorance made any difference*: i. e., that his knowledge of the charterer's past experience would have led him to discard 'rice ventilators.' Since the *claimants have the burden of proving 'neglect'* under this statute—unlike the Limited Liability Statute—*they must in any event fail*

* Section 502 of the Merchant Shipping Act, 1894, Part VIII, provides: "The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely: (1) Where any goods, merchandise, or other thing whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

upon this issue, for by no stretch can it be said that they proved that the fire was 'caused' by Fegen's ignorance of the charterer's past experience. The Strathdon, 89 Fed. Rep. 378; *The Salvore*, 60 Fed. (2) 683 (C. C. A. 2); *The Older*, 65 Fed. (2) 359 (C. C. A. 2)." (R. 2046). (Italics ours.)

The Circuit Court of Appeals for the Fourth Circuit in *Bank Line* v. *Porter*, 25 F. (2d) 843, cert. denied 278 U. S. 623, placed no similar burden on cargo in that case when cargo proved the shipowner's failure to inform the surveyor at Calcutta (whom he had employed to see to it that the "Poleric" was seaworthy on sailing from Calcutta) of the S. S. "Poleric's" history on her voyage from Greenock to Calcutta.

Furthermore, this Court has never held that a shipowner's neglect must be shown to be the direct cause of the fire; it would appear sufficient to bar the benefits of the statute if such neglect merely contributed to it. *Walker* v. *Transportation Co.*, 3 Wall. 150, at p. 153, where this Court said:

> "It is quite evident that the statute intended to modify the ship-owner's common-law liability for everything but the act of God and the King's enemies. We think that it goes so far as to relieve the ship-owner from liability for loss by fire, to which he has not contributed either by his own design or neglect".

See also *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420 at p. 424.

IV. *If a mere showing of loss by fire is sufficient to throw the burden of proof of negligence on the owner of cargo, is not this burden sustained by showing that the shipowner knowingly received for carriage on a general ship a large quantity of a cargo which he knew involved an abnormal fire hazard and the transportation of which the shipowner knew was still in the experimental stages?*

That the foregoing question should be answered in the affirmative would seem to be almost self-evident, and it has been so answered wherever it has arisen outside of the Second Circuit. Specifically, an affirmative answer is required under the decisions in the Fourth and Ninth Circuits and in England (see cases cited *supra*, pp. 15-17). In the Second Circuit, however, this question has been answered in the negative in this case. As appears from the findings, the cargo owners in this case fully sustained the burden as above set forth; yet the Circuit Court of Appeals held that this was not enough because—

> "In July, 1934, it had not yet *certainly* appeared that, given properly made meal, such ventilators were not adequate to protect even such a large single block as half of 665 tons" (R. 2045). (Italics ours.)

From the foregoing it appears that in the Second Circuit it is not enough to show that the shipowner knowingly carried a cargo which created a serious danger of fire; but that the cargo owner must prove that there was a *certainty* of fire. This, of course, is an impossible burden and amounts, in effect, to repealing the qualification on the exemption given by the Fire Statute, *i. e.*, the qualification: "unless such fire is caused by the design or neglect of such owner." In this Circuit, for all practical purposes, the exemption in case of fire is now absolute and unqualified.

As to the Liability of the Ship.

V. *Does the Fire Statute extinguish maritime liens for cargo damage or is its operation confined to in personam liability only?*

The Circuit Court of Appeals for the Second Circuit answers this question in the affirmative; and it expressly concedes that its decision in this respect is in conflict with that of the Circuit Court of Appeals for the Fifth Circuit

in *The Etna Maru*, 33 F. (2d) 232, cert. denied 280 U. S. 603 (R. 2043). It refers to that case as having been partially disapproved in *Earle & Stoddart* v. *Wilson Line*, 287 U. S. at p. 427, footnote. It is true that in so far as *The Etna Maru* decision held that the owner of an unseaworthy vessel could not claim the benefit of the Fire Statute, even though the unseaworthiness was unknown to her owner, the decision was there disapproved; but this Court has never disapproved the decision in that case that in those circumstances the ship may continue to be liable *in rem*, although the owner may not be liable *in personam*.

The reasons given by the Court below in support of its position on this question are in square conflict with numerous decisions of this Court (see annexed brief at pp. 40-44) and also with Section 186 of 46 U. S. Code where the statute in its very terms preserves an *in rem* liability when there is no *in personam* liability (see annexed brief at p. 42).

Importance of the Questions Involved.

If this decision, which appears to be based upon a misinterpretation of this Court's ruling in *Earle & Stoddart* v. *Wilson Line*, *supra*, is permitted to stand, it will constitute an invitation to all carriers to accept dangerous goods for carriage on a general ship, although there is no certain way whereby they can be carried in safety. The ensuing dangers are emphasized by the fact that under the decision below, the burden is placed upon the cargo owner of producing evidence to show specific acts of personal negligence on the part of the owner, whereas all the evidence is in the owner's hands. As we shall point out in the brief submitted herewith, the present ruling as to the burden of proof under the Fire Statute is not an isolated decision, but represents the settled law of the Second Circuit. Until this Court grants a review in a case of this type in the Second Circuit, the Fire Statute will have an entirely different effect in that Circuit from that given to it in

the other Circuits and in England. Also, what must be proved by a carrier to obtain the benefit of the exemption will differ in the various Circuits. In view of the all too numerous fires at sea, and the international character of such incidents, which usually involve property of many different nationals, the importance of uniform interpretation of the statute is obvious.

WHEREFORE, petitioners pray that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, directing it to send to this Court for review, a full transcript of the record in the said Circuit Court of Appeals in the case entitled "In the Matter of The Petition of Kabushiki Kaisha Kawasaki Zosenjo, Owner, and Kawasaki Kisen Kabushiki Kaisha, Bareboat Charterer of the Steamship 'Venice Maru', for exoneration from and limitation of liability", No. 120, October Term 1942, United States Circuit Court of Appeals for the Second Circuit, and that the decision of the Circuit Court of Appeals for the Second Circuit, dated January 25, 1943, and the decree of the District Court, entered on the 29th day of July, 1941, be reversed, and for such other relief in the premises as may be just.

Dated, New York, N. Y., March 31, 1943.

CONSUMERS IMPORT CO., INC.,
and other Cargo Claimants,
Petitioners.

By D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No.

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner, and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Charterer of the steamship "VENICE MARU", for Exoneration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., *et al.*,
Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI KISEN KABUSHIKI KAISHA,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the District Court (R. 1971-79) is officially reported in 39 Fed. Supp. 349. The District Court's Findings of Fact and Conclusions of Law are printed at pages 1979-1991 of the record. The District Court decree appears at pages 1999-2005 of the record.

The opinion of the Circuit Court of Appeals, filed January 25, 1943, has not yet been officially reported, but is printed at pages 2040-2049 of the record. The order for mandate, dated February 18, 1943, affirming the District Court decree, is printed at pages 2049-2050 of the record.

Jurisdiction of This Court.

The jurisdiction of this Court is founded on Section 240 of the Judicial Code, as amended, (28 U. S. C., Sec. 347) and Article III, Section 2, of the Constitution of the United States.

The Facts.

The facts are stated in the petition and will not be repeated here.

POINT I.

The Fire Statute does not relieve a carrier from liability for damage by fire caused by the stowage of a hazardous cargo on a general ship when there is no established, uniform or definite custom warranting the stowage of such cargo in the manner used by the carrier and when, in fact, the method of stowage adopted was no more than an experiment.

All the damage to the hundreds of shipments of general cargo on the "Venice Maru" was due to fire (or water used to extinguish the fire) caused by spontaneous combustion among bags of sardine meal stowed in a substantially solid mass in the vessel's No. 1 Lower Hold. It has also been found that such stowage was improper (Findings 27, R. 1985, and 49, R. 1988), was not justified by any custom or usage (Finding 25, R. 1984-5), and was the proximate cause of the fire (Finding 28, R. 1985; Conclusion 1, R. 1989).

The "K" Line was a common carrier. Consequently, its situation as such implied skill in the carriage of goods accepted by it for transportation. This Court as early as *Steamboat New World* v. *King*, 16 How. 469, said (p. 475):

> "In the first place, it is settled, that 'the bailee must proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part'. Story, Bailm. Sec. 15.
>
> It is also settled that if the occupation or employment be one requiring skill, the failure to exert that needful skill, *either because it is not possessed*, or from inattention, is gross negligence. Thus Heath, *J.*, in *Shields* v. *Blackburne*, 1 H. Bl. 161, says, 'If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because *his situation implies skill in surgery.*' And Lord Loughborough declares that an omission to use skill is gross negligence." (Italics ours.)

See also *Preston* v. *Prather*, 137 U. S. 604, 610, 611; *Hannibal R. R.* v. *Swift*, 12 Wall. 262, 273.

The foregoing obligation is emphasized in this case by the fact that the cargo which was improperly stowed, consisted of a commodity "recognized as an hazardous cargo subject to heating and to spontaneous combustion" (Finding 20, R. 1983) if not stowed in small lots and given adequate ventilation. The "K" Line undertook, however, to carry 38,000 bags or 1,900 tons of such cargo on the "Venice Maru" and thereby increased the ordinary hazard of the voyage. In *The Isis*, 290 U. S. 333, 348, Mr. Justice Cardozo, writing for this Court, pointed out that a carrier has no right to increase in any way the ordinary risks of transportation, but that if he chooses for his own purposes to send out a ship with needless enlargement of the ordinary risks, he should "not receive

exemption at the cost of the owners of the cargo if the perils thus enlarged have brought" about the loss.

The Courts below have found that the nature of sardine meal calls for special skill in its handling in order to avoid any overheating (Finding 26, R. 1985); that "the stowage of sardine meal was still in flux" (R. 2045, 2049) at the time this shipment was made; and that the required skill for the carriage of the large quantity which the "K" Line undertook to carry on the "Venice Maru" was not developed until 1935, the year after this shipment (Finding 24, R. 1984; see also R. 2045, 2049). Mr. Okubo, the active head of the "K" Line (R. 1986, 2043), "had had ample notice that it was subject to heating" (R. 2045). The Circuit Court of Appeals has also pointed out that "Okubo was not personally acquainted with what was necessary to protect the meal on such a long voyage" (R. 2045) as the one in question from Kobe to United States Atlantic ports. In fact, the "K" Line had already "experienced trouble from overheating of sardine meal on five of its vessels" in that trade (Finding 22, R. 1984). In short, the "K" Line, when it accepted these 38,000 bags or 1,900 tons of sardine meal for carriage on the "Venice Maru", was not possessed of the needful skill for the safe carriage of this exceptionally large quantity and did not know how "to exercise due care in their handling, including * * * such methods as their nature require". *Bank Line* v. *Porter*, 25 F. (2d) 843, 845 (C. C. A. 4); *The Nichigo Maru*, 89 F. (2d) 539, 542 (C. C. A. 4); *The Ferncliff*, 22 F. Supp. 728, 735 (D. C. Md., Chesnut, *J.*).

Thus, the "K" Line's fundamental breach of duty consisted in accepting for carriage on the "Venice Maru" an exceptionally large quantity of a commodity "recognized as an hazardous cargo subject to heating and to spontaneous combustion" (Finding 20, R. 1983-4) at a time when there was no approved method of carrying such a quantity in safety. This breach of duty was aggravated by stowing

this hazardous cargo on a general ship together with hundreds of other shipments such as silk, matches, porcelain goods, etc.

The Circuit Court of Appeals held, however, that the "K" Line, even under the foregoing circumstances, was entitled to the exemption afforded by the Fire Statute because, after its own failures in devising a proper method of safely carrying sardine meal on the long voyage from Kobe to United States Atlantic ports, it had employed a Lloyd's Surveyor, one Captain Fegen, to supervise the stowage of sardine meal on its vessels at Kobe. It is not shown that Fegen possessed any unusual qualifications in respect of stowing sardine meal. In fact, it affirmatively appears that "he had had no actual sea experience with sardine meal or apparently with other fish meal" (R. 2045). It also affirmatively appears that "the first ship which he stowed was the 'Getsuyo Maru'," a "K" Line ship (R. 2043), and that its cargo of sardine meal overheated (R. 2042). The "Venice Maru" was the second "K" Line vessel to come under his supervision. The method employed by him in stowing the sardine meal was not justified by any custom or usage (Finding 25, R. 1984-5) and has been found to be inadequate and unsafe (Findings 27, R. 1985, and 49, R. 1988). His attempt to afford the sardine meal the full ventilation which its nature requires (Finding 26, R. 1985), consisted of the use of rice ventilators (R. 2041-2) which "had for long been an accepted way of ventilating other heating cargoes" (R. 2045). This method had also been used by the "K" Line on two of its earlier ships and had failed to prevent overheating of their sardine meal cargoes (Findings 22, R. 1985, and 34, R. 1986). The District Court specifically found that the effect of the use of rice ventilators in sardine meal at the time in question "was unknown, uncertain and speculative" (Finding 23, R. 1984) and constituted an experiment (Finding 24, R. 1984).

In ruling that the mere employment of Fegen constituted a complete fulfillment of the "K" Line's personal

obligations as a common carrier and entitled it to the exemption of the Fire Statute in respect of the damage resulting from the stowage of a hazardous commodity in an improper and experimental manner, the lower Courts rely on their interpretation of the doctrine laid down by this Court in *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420.

In that case (287 U. S. at p. 424) this Court pointed out that "the immediate cause of the loss was the fire", which broke out at sea in the temporary bunkers and (p. 424) "the immediate cause of the fire was the condition of the coal at the time the voyage commenced which rendered the vessel unseaworthy". It was also there specifically found that (p. 424) "no design or neglect of the owner contributed" to the cause of the fire, but that (p. 424) "the sole cause of the unseaworthiness was the gross neglect of the ship's chief engineer in putting a new supply of coal on top of old coal then known to be heated". Under these findings, this Court held that the British shipowner was entitled to the exemption from liability granted by the Fire Statute since (p. 426) "the breach of the implied warranty of seaworthiness", standing alone, was not sufficient to constitute "'neglect' of the vessel-owner under the fire statute". In the footnote on page 427, this Court recognized that there were duties which the law imposed upon shipowners and that "in all cases where immunity from liability for damage by fire was held to be lost because of neglect of the owners, the courts have based their finding of neglect on the action of the owners or managing agents, or upon their failure to see that action was taken where it was their duty to act" (p. 427). Several of the cases thus referred to and cited by this Court in that footnote are the cases upon which we rely in the petition as being in conflict with the ruling in the case at bar. We submit that it is clear that this Court's ruling in the *Earle & Stoddart* case was not intended in any way to modify those decisions.

The facts in the instant case clearly establish a duty on the part of the carrier itself. Such duty consisted of its being able to exercise due care in the handling of a hazardous commodity "including * * * such methods as their nature require" (*Bank Line* v. *Porter*, 25 F. (2d) 843, at p. 845) and in possessing the requisite skill required of it when it accepted the hazardous commodity for transportation on a general ship. The carrier's liability here is not based merely on failure to exercise due diligence in making its vessel seaworthy, but rests upon the fundamental breach committed by it in attempting to carry a hazardous commodity on a general ship when it did not know how to do so with safety. It has already been pointed out that Okubo, its active head, "had had ample notice" that sardine meal was subject to overheating (R. 2045) and personally knew of the failure of rice ventilators to prevent overheating in sardine meal on two other "K" Line ships.* Since Mr. Okubo thus had personal knowledge of the failure of the "K" Line's own attempts to devise a safe method of stowage and ventilation for large lots and since he "knew sardine meal constituted a considerable portion of the cargo of the 'Venice Maru' and that some part of the large shipment of such meal might be stowed in a lower hold" (Finding 37, R. 1986), the "K" Line had actual knowledge "of a condition involving a danger of fire" existent on the "Venice Maru", whereas in the *Earle & Stoddart* case the British shipowner had no personal knowledge of the fire hazard existing on board its ship on sailing from New York.

The established facts clearly distinguish this case from *Earle & Stoddart* v. *Wilson Line*, *supra*, since delegating

* These are two of the vessels involved in the so-called *Wellman* cases reported under the heading of *The Nichiyo Maru*, 14 F. Supp. 727, affirmed 89 F. (2d) 539 (C. C. A. 4th). The District Court there rejected the "K" Line's contention that that meal had been improperly manufactured and specifically found that it was in good condition when shipped and that there was "no explanation from the evidence of the cause of damage other than inadequate ventilation" (14 F. Supp. at p. 733).

to a surveyor the stowage of a cargo which was known to be dangerous and which no one knew how to stow safely, is obviously an entirely different matter from leaving to a ship's engineer the routine duty of looking after her bunkers in a foreign port. The application and extension of the doctrine in the *Earle & Stoddart* decision to the case at bar ignores the duty of a carrier not to accept for carriage a large quantity of goods, which it knows to be likely to catch fire from spontaneous combustion, when at the time of shipment the art of carrying such commodity has not reached the stage where a safe method of carriage of such a large quantity has been ascertained, *i. e.*, at a time when the care and skill required to carry such cargo safely is still a matter of experiment.

The decision in the case at bar means that a carrier with full knowledge of the dangers of fire inherent in its action may turn over the conduct of an experiment as to whether the engagement of the carrier may be performed to a third party and thereby avoid the consequences flowing from the failure of the experiment.

As we have shown in the petition, such an extension of the doctrine of the *Earle & Stoddart* to this case renders the decision below in square conflict with the ruling of the Circuit Court of Appeals for the Ninth Circuit in *Williams Steamship Company* v. *Wilbur*, 9 F. (2d) 622, and of the Circuit Court of Appeals for the Fourth Circuit in *Bank Line* v. *Porter*, 25 F. (2d) 843, as to the application of the American Fire Statute, and the ruling of the House of Lords in *Lennards Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.*, (1915) A. C. 705, as to the analogous British Fire Statute. Those decisions have been discussed at pages 7-11 of the petition.

In summary, we submit that the attempted extension by the courts below of the doctrine of the *Earle & Stoddart* case should be reviewed by this Court because it is in

conflict with the settled rule in other Circuits and also because such extension is wrong in principle and will relax the vigilance to which common carriers by sea should be held in respect of safeguarding against fires.

POINT II.

The Fire Statute does not exonerate a carrier from liability for loss or damage to goods carried by it when the carrier delegates to a surveyor its obligation as to the stowage of a commodity, which it knows to be hazardous and likely to catch fire from spontaneous combustion and which forms a part of the ship's cargo, without informing the surveyor of its unsatisfactory experience in stowing and carrying such hazardous commodity.

Mr. Okubo, the Acting President and General Manager of the "K" Line (R. 1986), and Mr. Kitamura, his Chief Assistant (R. 618), testified as to heating of sardine meal on five of its ships and of the failure of the "K" Line to devise a proper method of adequately ventilating sardine meal cargoes in the comparatively new trade from Kobe to U. S. Atlantic Coast ports. It was after such heatings that Mr. Okubo made Captain Fegen "the sole person from shore at Kobe charged with the duty by 'K' Line of seeing to safe stowage of sardine meal on the 'Venice Maru'" (R. 1985).

It is admitted that Mr. Okubo did not advise Captain Fegen, nor instruct anyone else to advise Captain Fegen, of the failure of the methods of stowage used by the "K" Line ships to avoid the dangers of overheating. On two out of the five ships on which there had been overheating of sardine meal cargoes, the "K" Line had used rice ventilators to provide the sardine meal with the requisite circulation of air, but it was found that nevertheless the cargoes heated. This fact also had not been communicated to Captain Fegen.

Under such circumstances, it is not surprising that Captain Fegen, in stowing the sardine meal on the "Venice Maru", also used rice ventilators (R. 2041, 2042), which "had for long been an accepted way of ventilating other heating cargoes" (R. 2045), particularly since at the time in question, "the stowage of sardine meal was still in flux" (R. 2045). In short, Captain Fegen, not having been warned of the failure of such a method of stowage in respect of sardine meal, repeated on the "Venice Maru" the same experiment which had failed on two earlier "K" Line ships, which failures had led to his employment.

The Circuit Court of Appeals, however, ruled that Okubo's ohission to advise Fegen as to the failure of the "K" Line's prior experiments with rice ventilators did not constitute neglect sufficient to deprive the carrier of the benefits of the Fire Statute. We have shown in the petition (pp. 12-13) that the decision of the Second Circuit on this question is in square conflict with that of the Circuit Court of Appeals for the Fourth Circuit in *Bank Line* v. *Porter*, 25 F. (2d) 843. We shall not here restate the discussion in that respect.

The House of Lords has held that a carrier owes a personal duty to the owners of cargo carried on its vessel to convey to a person to whom it has delegated the responsibility of maintaining such vessel in a safe and seaworthy condition facts within the carrier's own knowledge affecting her safety. *Standard Oil Co.* v. *Clan Line Steamers*, (1924) A. C. 100. Lord Atkinson stated the basis of the decision as follows (at p. 123):

> "I think that the respondents by leaving the captain of the 'Clan Gordon' in ignorance of these instructions, by failing to bring them to his notice so that he would grasp and understand them, failed to discharge the duty they owed to the shippers of the cargo the vessel carried, and failed to use due diligence to make their ship seaworthy."

To like effect was the ruling in *The Schwan*, (1909) A. C. 450 (H. L.), and in *Lennards Carrying Co., Ltd.*, v. *Asiatic Petroleum Co., Ltd.*, (1915) A. C. 705 (H. L.).

We submit that the contrary ruling of the Second Circuit in the case at bar should be reviewed to the end that harmony be restored, not only between the different Circuits in this country, but also with the House of Lords on this important point.

POINT III.

A carrier to obtain the exemption afforded by the Fire Statute must bring the cause of the losses fully within the terms of the statute.

By its terms, the Fire Statute (originally Section 1 of the Act of March 3, 1851, now 46 U. S. Code, Sec. 182,*) grants to a shipowner only a conditional exemption from liability for a loss caused by fire on board ship. If the "fire is caused by the design or neglect of such owner", then there is no exemption.

The only authorities cited by the Circuit Court of Appeals for the Second Circuit in support of its ruling that mere proof of a fire by a shipowner brings the case within the exemption of liability granted by the Fire Statute are *The Strathdon*, 89 Fed. 374 (E. D. N. Y.), a district court case; and two of its own decisions, *The Salvore*, 60 F. (2d) 683, and *The Older*, 65 F. (2d) 359. The ruling of these cases is in conflict with the other authorities and is also clearly wrong in principle. We shall not repeat what has been said in the petition on this

* The text is printed in the appendix to the petition. Since the carrier in this case, the "K" Line, was the bareboat charterer of the "Venice Maru" (R. 1980), it is deemed under the provisions of 46 U. S. Code Sec. 186 a shipowner within the meaning of the Fire Statute.

subject; but it may be helpful to give a more detailed statement of what this Court said in *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, at p. 602:

> "Fire, except when produced by lightning, not being regarded in the commercial law as the act of God, ship owners, as common carriers, were held liable for any loss or damage caused thereby. The first section of the act of 1851 was no doubt intended to change this rule. It was copied (all except the last clause) from the second section of 26 George III., ch. 86, passed in 1786. The last clause of the section, excepting from its operation cases in which the fire is caused 'by the design or neglect' of the owners, was probably implied in the English statute without being expressed, as in ours. In all cases of loss by fire, not falling within the exception, the exemption from liability is total. But there is no inconsistency or repugnancy in allowing a partial exemption in cases falling within the third section; that is, cases of loss by fire happening without the *privity or knowledge* of the owners. *They may not be able, under the first section, to show that it happened without any neglect on their part, or what a jury may hold to be neglect;* whilst they may be very confident of showing, under the third section, that it happened without their privity or knowledge. The conditions of proof, in order to avoid a total or a partial liability under the respective sections, are very different.
>
> "It is true the owners of a ship may desire to contest all liability whatever, as well as to establish a limited liability *if they fail in the first defence*; and this they may do, as well in cases of loss by fire as in other cases, in one and the same proceeding. And we see no repugnancy between the two defences. One is a more perfect defence than the other, and requires a different class or degree of proofs. That is all." (109 U. S. at p. 602) (Italics ours.)

Section 3 of the Act of March 3, 1851, is now known as the Limitation Statute (46 U. S. Code, Sec. 183). The Circuit Court of Appeals for the Second Circuit admits

that the shipowner, to secure the partial exemption granted by that section, must bring itself fully within the qualifying terms thereof.* That Court earlier in *The Republic*, 61 Fed. 109, 112-3, treated the Limitation Statute as a partial exemption granted to the shipowner by statute. We submit that it offers no adequate reason why a carrier should not also bring itself fully within Section 1 to obtain the total exemption granted by it.

In *Quinlan* v. *Pew*, 56 Fed. 111; 115-116, the Circuit Court of Appeals for the First Circuit recognized that in the language quoted *supra* from the *Hill* case, this Court had ruled that shipowners, in order to obtain the relief granted by Sections 1 and 3 of the Act of March 3, 1851, must bring themselves within the terms of such sections to obtain the exemptions from liability granted by the statute. It pointed out that the only difference between the effect of the two sections is that "when the owners may not be able, under the first section, to show absence of neglect, they may be very confident of showing, under the third section, absence of privity or knowledge" and thus obtain the benefit of that latter section since "privity or knowledge may be less than neglect". (56 Fed. at pp. 115-116.)

To the same effect, are the observations of the Circuit Court of Appeals for the Sixth Circuit in *Henson* v. *Fidelity & Columbia Trust Co.*, 68 F. (2d) 144, 147.

In *Hines* v. *Butler*, 278 Fed. 877, the Circuit Court of Appeals for the Fourth Circuit appears to have taken the same view. That Court said (p. 880):

> "Without again repeating the decisions referred to by the District Judge, we agree with him that, al-

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* The authorities are collected in *The Silver Palm*, 94 F. (2d) 776 at p. 777 (C. C. A. 9).

> though liability exists under Section 4282,* yet the owner is entitled to limit that liability, so far as the destruction of any goods or merchandise shipped on such vessel is concerned, under the provisions of Section 4283,* to the amount of the value of the vessel and her freight then pending." (p. 880 of 278 Fed.).

A reading of Judge Rose's opinion in the District Court (264 Fed. 986) makes it fairly apparent that he considered the burden of proof to rest upon the shipowner under the Fire Statute as well as under the Limitation Statute.

As pointed out in the *Hill* case, *supra*, our Fire Statute was modeled on the British Fire Statute. It has long been well established in England that mere proof of fire is insufficient to secure the benefits of the exemption granted by the statute. The English courts hold that a shipowner must bring himself completely within all the terms of the statute to obtain the benefit of the exemption. *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.*, (1915) A. C. 705, affirming (1914) 1 K. B. 419, 432; *Ingram & Royle* v. *Services Maritimes du Treport*, (1914) 1 K. B. 541, 559 (C. A.), where Kennedy, *L. J.*, pointed out that (p. 559):

> "* * * it is essential for the party who is relying upon the provisions of s. 502 of the Merchant Marine Act, 1894, not merely to shew that the goods, for the loss of which he is being sued, were lost by reason of fire, but also to shew affirmatively that the loss happened without his actual fault or privity."

A like construction has been given by the Privy Council to the analogous section in the Canadian Water Carriage of Goods Act of 1910. *Royal Exchange Assurance* v. *Kingsley Navig. Co.*, (1923) A. C. 235, 244-5, referring with approval to the foregoing language of Kennedy, *L. J.*

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* R. S. 4282 is the Fire Statute and is derived from Sec. 1 of the Act of March 3, 1851. R. S. 4283 is the Limitation Statute and is derived from Sec. 3 of the same Act.

In the Second Circuit, the Courts, we submit, have, by unwarranted interpretation of the statute, treated the exemption from liability granted by the Fire Statute as a general blanket exemption from all losses by fire. In so doing, they ignore the qualifying words which limit the terms of the statute to only certain fires. Their interpretation violates the well-settled principle that the burden rests on a common carrier seeking exemption from his common law liability as an insurer of the safety of the goods entrusted to his custody to bring any loss or damage within the exact terms of a valid exception. *Clark v. Barnwell*, 12 How. 272; *Lawrence v. Minturn*, 58 U. S. 100, 111; *The Mohler*, 88 U. S. 233; *The Edwin I. Morrison*, 153 U. S. 199, 211; *The Malcolm Baxter, Jr.*, 277 U. S. 323, 334; and numerous other cases. This Court reviewed the authorities and restated the rule in *The Vallescura*, 293 U. S. 296, pointing out at p. 304:

> "The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability." (293 U. S., at p. 304).

The foregoing cases relate to contractual exemptions; but there is no distinction in principle between such an exemption and a statutory exemption. As this Court pointed out in *The Vallescura*:

> "In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed

> to his undertaking, such as his immunity from liability for act of God or the public enemy. See Carver, Carriage by Sea (7th ed.) Chap. IV. (293 U. S., at p. 303.)

The English courts have consistently ruled that a shipowner bears the burden of bringing himself fully within all statutory exemptions from liability, whether total or partial, afforded by the British Merchant Shipping Act of 1894. That Act provides for exemptions which are almost identical with those granted by our Act of March 3, 1851. At page 34, *supra*, we have cited the cases which deal with the Fire section of the British Act. As to its Limitation provision, Viscount Haldane in *Standard Oil Co.* v. *Clan Line Steamers*, (1924) A. C. 100, said at p. 113:

> "It is now well settled that those who plead the section as a defence must discharge the burden of proving that they come within its terms. That is to say, they must show that they were themselves in no way in fault or privity to what occurred; in this case, to the failure to render the ship properly seaworthy, by taking care that the master was instructed about the special risk arising from its shape."

The rule in the Second Circuit as to burden of proof under the Fire Section can be traced through the decisions in *The Strathdon*, *supra*, *The Salvore*, *supra*, and *The Older*, *supra*, down to the present case. The burden on the cargo owner has become heavier as the rule developed, until the point has now been reached where a shipowner cannot be held liable for damage by fire unless chargeable with knowledge that fire was certain to result from his action (R. 2045). In *The Silvercypress*, 1943 A. M. C. 224, recently decided by a District Court in the Second Circuit, but which has not yet reached the Circuit Court of Appeals, the court adds a further basis for exoneration, i. e., that the shipowner is not liable for damage by fire unless

his negligence is the *sole** cause of the fire. In that case, the District Court said:

> "I am satisfied that the *Silvercypress* was unseaworthy on voyage 16 and throughout voyage 17 up to the time of the fire, in the way of the auxiliaries, by reason of the neglect of the owners, but the libellants have failed to establish that the cause of the fire was solely attributable to such unseaworthiness.
>
> . . . . . .
>
> The limitation of turn-arounds in port and the reluctance to spend money for shore labor outside of Hong Kong demonstrates this. The failure to have the vessel overhauled at Hong Kong after notice of conditions on voyage 16, from New York to Capetown, or at Manila, and the certification by Cropley that the vessel was seaworthy when she sailed from New York on voyage 17 deserve condemnation. But considering the history of the fire statute (See *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd. (The Gabilo)*, 287 U. S. 420, 1933 A. M. C. 1) and references there cited. I feel it must be strictly construed, and therefore the libels are dismissed, without costs." (1943 A. M. C. 224, 251, 252.)

We submit that the importance of this question as to the burden of proof requires an authoritative ruling by this Court. Until this Court makes such a ruling, the Fire Statute will have an entirely different effect in the Second Circuit from that given it in the other Circuits.

* Cf., in this connection, the language used by this Court, in *Walker v. Transportation Co.*, 3 Wall 150, 153, quoted at p. 17 of the petition.

POINT IV.

Even assuming that a mere showing of loss by fire is sufficient to shift to cargo the burden of proving neglect on the part of the shipowner, proof that the shipowner knowingly received for carriage on a general ship a large quantity of a cargo which he knew involved an abnormal fire hazard and the transportation of which the shipowner knew was in an experimental stage, is sufficient to establish "design or neglect" within the meaning of the Fire Statute.

Even if it should be conceded, for the sake of argument, that mere proof of fire was sufficient to bring such a loss as occurred in this case within the exemption granted by the Fire Statute and place upon cargo the burden of showing neglect on the part of the shipowner, it is submitted that when it was proved in the present case that the method used by the shipowner for the protection of a cargo known to be hazardous (Finding 20, R. 1983; see also R. 2042) was "uncertain and speculative", (Finding 23, R. 1984), the petitioners had fully sustained the burden which was upon them. The Circuit Court of Appeals, however, said that this was not so because "in July, 1934, it had not yet *certainly* appeared that, given properly made meal, such ventilation was inadequate to protect even such a large single block as half of 665 tons" (Italics ours) (R. 2045), which was the quantity stowed in No. 1 lower hold of the "Venice Maru". It is submitted that in making this ruling, the decision below is in square conflict with *Cornee* v. *Baltimore & Ohio R. R. Co.*, 48 F. (2d) 497 (C. C. A. 4). In that case the Circuit Court of Appeals for the Fourth Circuit held:

> "Negligent methods of operation do not always or even generally result in disaster. The inquiry is, not whether a method of operation has been used without disastrous results, but whether it is of such a char-

> acter that danger of injury is reasonably to be apprehended from its use. Where the element of danger is present, successful operation is to be deemed 'fortunate rather than prudent'." (48 F. (2d) at pp. 501-502.)

See also *Texas & Pac. Ry. Co.* v. *Carlin*, 111 Fed. 777, 781 (C. C. A. 5); *The Santa Rita*, 176 Fed. 890, 895 (C. C. A. 9); and *Johnson* v. *Kosmos Portland Cement Co.*, 64 F. (2d) 193, 196 (C. C. A. 6).

We have also shown at pages 15-17 of the petition that the Courts in the Fourth Circuit and the Ninth Circuit (*Bank Line* v. *Porter*, 25 F. (2d) 843, and *Williams S. S. Co.* v. *Wilbur*, 9 F. (2d) 622) have held that proof of knowledge on the part of a shipowner of the existence of a less clearly hazardous condition involving a danger of fire was sufficient to deny to the shipowner the qualified exemption from liability conferred by the Fire Statute. See also *Leonard's Carrying Co., Ltd.*, v. *Asiatic Petroleum Co., Ltd.*, (1914) 1 K. B. 419, 441, affirmed (1915) A. C. 705 (H. L.).

The requirement laid down by the Circuit Court of Appeals for the Second Circuit that cargo must prove that an experimental method of stowage of a hazardous cargo which was not justified by any custom or usage (Finding 23, R. 1984-5) and which had proven inadequate in two other cases of which the carrier had actual knowledge (Findings 22, R. 1984, and 34, R. 1986), created a *certainty* of fire obviously imposes upon cargo an impossible burden and amounts, as a practical matter, to repealing the qualification attached by Congress to the exemption afforded by the Fire Statute.

POINT V.

The Fire Statute by its very terms does not apply to the *in rem* liability of a vessel for cargo damage: its operation is confined to the *in personam* liability of the carrier.

The Fire Statute (46 U. S. Code, Sec. 182) merely provides that "*no owner* of any vessel shall be liable * * * for * * * any loss or damage * * * by reason or by means of any fire on board any such vessel, unless such fire is caused by the design or neglect of such owner" (Italics ours). It does not purport to exonerate the vessel itself. The Circuit Court of Appeals here, however, held (R. 2043) that the Fire Statute is applicable to the vessel's liability. It concedes (R. 2043) that such holding is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 F. (2d) 232. It says in reference to *The Etna Maru*:

> "So far as that decision retains any authority after *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420, we cannot agree. Section 182 gives complete exoneration of liability; Section 183 only a limitation of liability". (R. 2043).

It is true that in so far as *The Etna Maru* held that an owner of an unseaworthy vessel may not claim the benefit of the Fire Statute if the unseaworthiness could have been discovered by due diligence, that decision was disapproved by this Court. But there is nothing in the decision in the *Earle & Stoddart* case which indicates that this Court disapproved *The Etna Maru* where it held that the ship would be liable *in rem* when the owner was not liable *in personam*. The language used by this Court in *Earle & Stoddart* (p. 427 of 287 U. S.) with respect to *The Etna Maru* reads as follows:

> "In *The Etna Maru*, 20 F. (2d) 143, the District Court was of opinion that the fire statute did not con-

fer immunity where the loss was due to unseaworthiness existing at the beginning of the voyage. As an alternative ground of decision, however, the court held that the vessel-owner had not overcome a presumption of personal neglect, arising from the fact of unseaworthiness. On appeal the case was affirmed, 33 F. (2d) 232, but apparently on the ground that the fire statute, like the statutes limiting the extent of liability, leaves the owner liable, in any event, up to the value of the ship. But compare *The Rapid Transit*, 52 Fed. 320, 321. In so far as the decision rests on the ground advanced by the cargo-owners here, it cannot be approved."

It is submitted that the Circuit Court of Appeals for the Fifth Circuit was entirely right in the position which it took. It is well settled that when cargo is placed aboard a vessel, the ship becomes bound to the cargo and the cargo to the ship and an *in rem* liability is created if the ship loses or damages the cargo. See *Dupont* v. *Vance*, 19 How. 162, where this Court said:

> "The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment, has very long existed in the general maritime law. It is found asserted in a variety of forms in the Consulado, the most ancient and important of all the old codes of sea laws, (see Chaps. 63, 106, 227, 254, 259) and the maxim that the ship is bound to the merchandise, and the merchandise to the ship, for the performance of the obligations created by the contract of affreightment, is a settled rule of our maritime law." (19 How. at pp. 168, 169).

See also *The Kookuk*, 9 Wall. 517, 519; *The Belfast*, 7 Wall. 624, 642; *The Eddy*, 5 Wall. 481, 494; *The Delaware*, 14 Wall. 579, 596.

In *Schooner Freeman* v. *Buckingham*, 18 How. 182, this Court dealt with a situation in many respects similar to that which the Court has before it in the present case, viz., where a shipowner has entrusted the entire control and

employment of its ship to another. In the *Schooner Freeman* v. *Buckingham* this Court held:

> "* * * that when the general owner intrusts the special owner with the entire control and employment of the ship, it is a just and reasonable implication of law that the general owner assents to the creation of liens binding upon his interest in the vessel, as security for the performance of contracts of affreightment made in the course of the lawful employment of the vessel." (18 How. at p. 190).

By Section 5 of the Act of March 3, 1851, which is now embodied in 46 U. S. Code, Section 186, it is provided:

> "The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof". (46 U. S. Code, 186).

It is only by virtue of this provision that the "K" Line has any right whatever to assert that it has the benefit of either Section 1 of the Act of March 3, 1851, the Fire Statute, or Section 3 of the same Act, the Limitation Statute. By the terms of Section 5, the charterer is deemed the owner of the vessel within the meaning of the Act. This circumstance, however, does not affect the "*in rem*" liability of the ship. The statute says so. Its language no doubt was inspired by that of Mr. Justice Story in *United States* v. *Brig Malek Adhel*, 2 How. 210, at p. 233:

> "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."

Notwithstanding this clear language of Mr. Justice Story, the Circuit Court of Appeals in the present case

dismissed this well settled doctrine of this Court as "a bit of mythology, a fiction not to be applied to defeat a statute designed to protect and foster maritime enterprise" (R. 2043). The Court in making this ruling is in square conflict with *United States v. Brig Malek Adhel*, 2 How. 210, *supra*, and with *The Barnstable*, 181 U. S. 464, *The Schr. Freeman v. Buckingham*, 18 How. 182, *The Yankee Blade*, 19 How. 82, 89, *The China*, 7 Wall. 52, *The John G. Stevens*, 170 U. S. 113, 120, and *Homer Ramsdell Co. v. Compagnie Generale Transatlantique*, 182 U. S. 406. It is also in conflict with *The Young Mechanic*, Fed. Cas. No. 18181; *Parson v. Cunningham*, 63 Fed. 132 (C. C. A. 1).

The Circuit Court of Appeals was in error when it said that the application of what it calls "a bit of mythology" would defeat the statute. It overlooked the last provision in Section 5 of the Act of March 3, 1851, which is that the charterer who mans, victuals and navigates a vessel at his own expense, shall be deemed the owner, and that, under these circumstances, the vessel "shall be liable in the same manner as if navigated by the owner thereof" (46 U. S. Code, §186; see p. 42, *supra*). The "K" Line did man, victual and navigate the "Venice Maru" at its own expense (Finding 2, R. 1979-80). This circumstance, by the language of the statute, did not affect the liability of the vessel. The statute provided that she should "be liable in the same manner as if navigated by the owner thereof." The interpretation of the Act by the Circuit Court of Appeals for the Fifth Circuit does not defeat the mandate of the statute. It is the interpretation in the Second Circuit which defeats that mandate by rendering nugatory the concluding words of its Section 5.

If the reasoning of the Court below in its interpretation of the statute is correct, then the "K" Line, not being the owner of the "Venice Maru," would not be entitled to the exemption given by Section 1, which would then only apply to Kawasaki Zosenjo. But the Court held that the

statute did apply to the "K" Line and afforded it exemption of its liability as charterer.

Even in cases where the fault is entirely that of a bare-boat charterer, a decree for loss by negligence may be made directly against the ship and need not provide that collection shall be made from the charterer. *The Alert*, 61 Fed. 113, affirming 40 Fed. 836, following *Schr. Freeman v. Buckingham*, 18 How. 182, *supra*.

The view of Congress contained in Sec. 5 of the Act of March 3, 1851, (now 46 U. S. C., Sec. 186), remains the view of Congress today. See *Carriage of Goods by Sea Act of 1936*, Title 46, U. S. Code, Section 1301, *et seq.*, where in Section 1304 (2) of Title 46, U. S. Code, it is provided:

> "*Neither the carrier nor the ship* shall be responsible for loss or damage arising or resulting from * * * Fire, unless caused by the actual fault or privity of the carrier; * * *." (Italics ours.)

If it had been considered that a provision exonerating a carrier was sufficient, there would have been no need to mention "the ship". Any doubt on this subject is removed by Section 1308 of that Act, which provides:

> "The provisions of this chapter and section 25 of Title 49 shall not affect *the rights and obligations of the carrier*, under the provisions of sections 175, 181 to 188* and 801 to 842 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels". (Title 46 U. S. Code, 1308). (Italics ours.)

In this section, Congress specifically refers only to the rights and obligations of the carrier.

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* These sections include the original provisions of the Act of March 3, 1851, *i. e.*, the Fire Statute, the Limitation Statute and the Charterer Section.

This conceded conflict between the Circuit Court of Appeals of the Second and Fifth Circuits, as well as the conflict below with many decisions of this Court, should be resolved by this Court.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should be granted in this case.

Respectfully submitted,

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APPENDIX.

THE FIRE STATUTE.

(Section 1 of the Act of March 3, 1851, C. 43, 9 Stat. 635, now 46 U. S. Code, Sec. 182, formerly R. S. 4282.)

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, *unless such fire is caused by the design or neglect of such owner.*". (Italics ours.)

LIMITATION STATUTE.

(Section 3 of the Act of March 3, 1851, C. 43, 9 Stat. 635, now 46 U. S. Code, Sec. 183, formerly R. S. 4283.)

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.".

CHARTERER MAY BE DEEMED OWNER.

(Section 5 of the Act of March 3, 1851, C. 43, 9 Stat. 636, now 46 U. S. Code, Sec. 186, formerly R. S. 4286.)

"The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."